

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION OFFICE OF SECRETARY

In the Matter of

Amendment of the Commission's Rules to Preempt State and Local Regulation Tower Siting for Commercial Mobile Services Providers RM-8577

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To: The Commission

COMMENTS OF MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.

Mobile Telecommunication Technologies Corp. ("Mtel"), by its attorneys, and pursuant to Sections 1.4 and 1.405 of the Commission's rules, $\frac{1}{2}$ respectfully submits its comments in support to the Cellular Telecommunications Industry Association Petition for Rulemaking (the "Petition") submitted to the Commission on December 22, 1994. For the reasons set forth below, Mtel submits both that the Commission has all authority necessary to grant the requested relief, and that grant of such relief is essential in order for the Commission to comply with its Section 1 mandate to, among other things, "make available so far as possible, to all the people of the United States a rapid, efficient, ...communications service with adequate facilities at reasonable prices". $\frac{2}{}$

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See also the Commission's Public Notice of January 18, 1995, Report No. 2052, inviting comments as of this date.

²/ The Communications Act of 1934, as amended, 47 USC §151 (the "Act").

I. Mtel's Interest In This Proceeding

subsidiaries, including Destineer Mtel and its ("Destineer") and SkyTel Corporation ("SkyTel"), are Commission licensees providing a wide range of high technology wireless communications services. SkyTel is the preeminent provider of nationwide paging service, and holds one of only three Part 22 nationwide paging license and numerous common carrier non-network paging licenses. Destineer Corp. is the sole narrowband PCS entity to be awarded a Pioneer's Preference to operate an advanced nationwide wireless network. $\frac{3}{}$ Destineer has been awarded licenses on two additional pieces of PCS narrowband spectrum, after being the high bidder for those additional nationwide narrowband PCS authorizations at the Commission's July 25, 1994, auction. $\frac{4}{}$

By virtue of its holding, the nationwide authorizations discussed above, Mtel is uniquely positioned to provide the Commission with informed comment regarding the adverse impact that unwarranted state and local construction restrictions can have on the creation of an efficient, nationwide wireless system.

II. The Commission Is Empowered To Preempt Stifling State And Local Regulations

A. Constitutional Bases for Preemption

The law is absolutely clear that the Supremacy Clause of the United States Constitution empowers Congress to preempt state and

^{3/} See, Nationwide Wireless Network Corp., 9 FCC Rcd 3635 (1994).

Destineer has already paid the U.S. Treasury over \$125,000,000 for that spectrum, and may become obligated to pay more.

localities in any of several ways: (a) By a clear expression of intent to preempt; (b) when state and federal laws directly conflict; (c) where compliance with both state and federal law is physically impossible; (d) where there is an implicit barrier to state regulation; (e) when Congress occupies the field, i.e., it has legislated comprehensively and there is no room for supplemental state law; or (f) when state law stands as an obstacle toward accomplishing the full objectives of Congress. 5/

B. Statutory Basis for Preemption

As CTIA explained in the Petition, Section 332 of the Act mandates that the Commission ensure the development of a competitive, efficient mobile services infrastructure subject to uniform federal regulation. 47 USC §332. (Petition, at 3.) CTIA merely urged the Commission to preempt state and local tower site regulations which contravene that mandate. Clearly, the type of state and local ordinances and restrictions at issue in the Petition would have the effect of inhibiting uniform regulation.

In enacting recent amendments to Section 332 and 2(b) of the Act, the Congress expressly prohibited state and local governments from regulating entry into mobile services. The underlying goal behind that express restriction was congressional intent to prohibit state entry barriers, whether direct or indirect, which have the purpose or effect of barring Commercial Mobile Radio Service ("CMRS") operations.

<u>See Louisiana Pub. Serv. Commission v. FCC</u>, 476 U.S. 355, 368-369 (1986).

At this time, there is no question with respect to the inability of states to regulate entry directly: They are expressly prohibited from doing so. Nor is there meaningful dispute regarding their ability to regulate entry indirectly, through rate regulation. $\frac{6}{}$ Yet there is one further avenue that certain states and localities apparently believe that they may utilize to frustrate CMRS service offerings: Unnecessary and unwarranted infrastructure build-out limitations that have the effect of postponing the availability of wireless offerings and increasing the cost of such offerings when they do become available.

C. Established Constitutional and Statutory Bases for Preemption mandate that the Communications Act to Preempt State and Local Regulation that Frustrates Wireless Construction

Mtel submits that at least four of the above recognized criteria warrant and justify federal preemption of state and local regulations that unduly restrict wireless construction. there is at the very least an implicit barrier to state regulation. The underlying goal behind the 1993 amendments that preempt entry regulation was the enhancement of competition. Congress and the Commission, sought to accomplish that goal by expanding the number of wireless carriers, and thus established an implicit barrier to state and local ordinances that unduly inhibit construction and impede construction. The language of Section 332,

Whereas the Act permits states to continue rate regulation, it does so only under well delineated conditions, which conditions include a requirement that the Commission affirmatively determine that such regulation is necessary to facilitate the provision of competitive service offerings.

which precludes "any entry regulation by states", evidences the existence of this "implicit barrier". It also constitutes a "clear expression of intent to preempt", thus presenting an independent basis for preemption. Moreover, that language, coupled with a reasoned review of the legislative history of 1993 amendments to the Act, demonstrates a conflict between federal law (which seeks to maximize competition) and state or local ordinances that have the effect (and perhaps the purpose) of minimizing competition.

III. Preemption Of Restrictive State And Local Ordinances Is Particularly Necessary To Afford The Public With The Benefits Of Efficient Nationwide Communications Services

As CTIA pointed out in its Petition, there are over 38,000 different local jurisdictions that could condition and otherwise interfere with the build-out of CMRS infrastructure. Large cellular carriers often have difficulty in dealing with a host of different jurisdictions located within their service area. But that difficulty pales in comparison to the problems presented to nationwide carriers who must be prepared to meet the demands of all jurisdictions. The sheer volume of localities involved makes it difficult, if not impossible, even to understand with certainty all

Indeed, review of the applicable legislative history reflects clear Congressional intent to reserve only narrowly state regulatory authority. See, e.g., 139 Cong. Rec. H3287 (Daily Ed. May 27, 1993) (Statement of Rep. Markey).

of the nuances included in all of the various restrictive regulations, much less comply fully with them. $\frac{8}{}$

Where regulations are understood and fully complied with, even greater problems arise. Simply put, there is no practical way in which a nationwide carrier can both comply with a large number of potentially differing state and local regulations and at the same time provide the "efficient, nationwide...radio communications service...at reasonable charges" as envisioned by Section 1 of the Act. Rather, there is a necessary tradeoff between practical, cost-efficient operation and compliance with multiple, often conflicting state and local regulations. And if a nationwide carrier were capable of operating an efficient and fully compliant system, there would remain the considerable problem of its providing different communities with different levels of service, at different costs.

IV. Conclusion

For all the reasons set forth above, Mtel supports the CTIA Petition. The relief requested by CTIA is necessary in order to

Certain examples of restricting and conflicting local regulations were presented recently in a Petition for Further Notice of Proposed Rulemaking in ET Docket 93-62, filed by the Electromagnetic Energy Association ("EEA") on December 22, 1994. For example, EEA reported that in Puerto Rico applicants must perform complicated engineering studies not required by the Commission before commencing operation of any transmitter. (EEA Petition, at 20); New Jersey is reportedly in the process of requiring RF registration and inspections (EEA Petition, at 19); the city of Stamford, Connecticut, requires review and hearing by a panel of experts prior to initiation of service (EEA Petition, at 13); and the Village of Wilmette, Illinois, has adopted RF standards more stringent than that adopted by the Commission (EEA Petition, at 14).

permit genuine competition at the local and regional level. It is even <u>more</u> necessary in order to permit meaningful competition on a nationwide level. Finally, authority for this necessary preemption currently exists and should be utilized.

Respectfully submitted,

MOBILE TELECOMMUNICATION TECHNOLOGIES CORP

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February 17, 1995

CERTIFICATE OF SERVICE

I, Catherine M. Seymour, a secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 17th day of February 1995, sent by First Class U.S. Mail copies of the foregoing "COMMENTS OF MOBILE TELECOMMUNICATION TECHNOLOGIES CORP." to the following:

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